

FILED  
COURT OF APPEALS  
MOUNTAIN VIEW

10 APR 19 AM 9:48

STATE OF WASHINGTON

BY     *KT*      
DEPUTY

NO. 40020-1-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

---

---

STATE OF WASHINGTON,

Respondent,

v.

KEVIN R. BOWEN,

Appellant.

---

---

ON APPEAL FROM THE  
SUPERIOR COURT OF MASON COUNTY

Before the Honorable James B. Sawyer II, Judge and  
the Honorable Amber Finlay, Judge

OPENING BRIEF OF APPELLANT

---

---

Peter B. Tiller, WSBA No. 20835  
Of Attorneys for Appellant

The Tiller Law Firm  
Corner of Rock and Pine  
P. O. Box 58  
Centralia, WA 98531  
(360) 736-9301

*pm 4-16-10*

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR .....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	1
C. STATEMENT OF THE CASE.....	3
1. <u>Procedural History</u> .....	3
D. ARGUMENT .....	8
1. <u>THE SENTENCING COURT ERRED WHEN IT FOUND THE PRESUMPTION OF CONCURRENT SENTENCING DID NOT APPLY AND ORDERED THAT THE SENTENCES BE RUN CONSECUTIVELY</u> .....	8
2. <u>THE TRIAL COURT IMPOSED AN EXCEPTIONAL SENTENCE WITHOUT PRIOR NOTICE BY THE STATE, IN VIOLATION OF BOWEN’S RIGHT TO DUE PROCESS UNDER THE FEDERAL AND STATE CONSTITUTIONS</u> .....	11
3. <u>BOWEN DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CHANGE OF PLEA AND SENTENCING</u> .....	17
E. CONCLUSION.....	22

**TABLE OF AUTHORITIES**

<b><u>WASHINGTON CASES</u></b>	<b><u>Page</u></b>
<i>State v. Bobenhouse</i> , 143 Wn. App. 315, 177 P.3d 209 (2008).....	12
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	19
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	13
<i>In re Long</i> , 117 Wn.2d 292, 815 P.2d 257 (1991).....	12
<i>State v. Moore</i> , 63 Wn.App. 466, 820 P.2d 59 (1991).....	15, 16, 21
<i>In re Morris</i> , 34 Wn.App. 23, 658 P.2d 1279 (1983).....	18
<i>State v. Newlun</i> , 142 Wn. App. 730, n.3, 176 P.3d 529 (2008).....	11
<i>State v. Parker</i> , 132 Wn.2d 182, 937 P.2d 575 (1997).....	11
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	18
<i>State v. Womac</i> , 160 Wn.2d 643, 160 P.3d 40 (2007).....	12, 14
<i>Personal Restraint of Brett</i> , 142 Wn.2d 868, 16 P.3d 601 (2001).....	17
<b><u>UNITED STATES CASES</u></b>	<b><u>Page</u></b>
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	13, 14
<i>In re Winship</i> , 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).....	13
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	17, 18
<b><u>REVISED CODE OF WASHINGTON</u></b>	<b><u>Page</u></b>
RCW 9.94A.030(9).....	9, 10
RCW 9A.76.170.....	4
RCW 9.94A.400(3).....	15

RCW 9.94A.525(1).....	8, 10
RCW 9.94A.535 .....	9, 11, 12, 20
RCW 9.94A.535(2)(c) .....	1, 14
RCW 9.94A.537 .....	12
RCW 9.94A.537(1).....	12, 13, 14
RCW 9.94A.589 .....	9, 22
RCW 9.94A.589(1).....	10, 11, 20
RCW 9.94A.589(1)(a) .....	8, 9, 11, 16, 20
RCW 9.94A.589(1)(b) .....	8, 11
RCW 9.94A.589(3).....	10, 165, 17, 20

**CONSTITUTIONAL PROVISIONS**

**Page**

U.S. Const. Amend. VI.....	17
U.S. Const. Amend. XIV .....	17
Wash. Const. art. 1, § 3.....	17, 18
Wash. Const. art. 1, § 22.....	17

**COURT RULES**

**Page**

CrR 3.1(b)(2).....	19
--------------------	----

**FEDERAL CASES**

**Page**

<i>United States v. Leonti</i> , 326 F.3d 1111, 1117 (9 Cir. 2003).....	20
-------------------------------------------------------------------------	----

**A. ASSIGNMENTS OF ERROR**

1. The trial court erred when it ordered the appellant's sentence be served consecutively to a previously imposed sentence in another cause number.

2. The trial court erred in imposing an exceptional sentence under RCW 9.94A.535(2)(c) because the State failed to provide notice of its intent to seek an exceptional sentence.

3. The appellant did not receive effective assistance of counsel at sentencing because his attorney did not object to setting sentencing on another day after the appellant entered a guilty plea to the offense of bail jumping after being sentenced earlier that day before another judge in another case, and did not schedule sentencing in both cases to take place on the same day.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Should a defendant be sentenced under RCW 9.94A. 589(1)(a) where the appellant was sentenced on March 23, 2009 in one cause, and entered a guilty plea to bail jumping in a second cause and was sentenced on the bail jumping matter on November 16, 2009? Assignment of Error 1.

2. Sentences imposed under RCW 9.94A. 589(1)(a) subsection shall be served concurrently. Did the court err in sentencing the appellant under RCW 9.94A.589(3) and err in ordering consecutive sentences where the appellant was sentenced on March 23, 2009 in one cause, and entered a guilty plea to bail jumping in a second cause, and was sentenced on the bail jumping matter on November 16, 2009? Assignment of Error 1.

3. Does imposition of consecutive sentences where the appellant was sentenced on March 23, 2009 in one cause, and entered a guilty plea to bail jumping in a second cause, and was sentenced on the bail jumping matter on November 16, 2009, constitute an exceptional sentence? Assignment of Error 2.

4. Where the State gives no notice of its intent to seek an exceptional sentence, is a criminal defendant's State and Federal Due Process rights violated when the court imposes an exceptional sentence in the form of consecutive sentences? Assignment of Error 2.

5. An accused's right to counsel includes the right to the effective assistance of counsel at sentencing, and competent counsel must be aware of the sentencing law applicable to his client's case. Appellant's attorney was aware that the Sentencing Reform Act (SRA) required the

sentences for the two causes to run concurrently if they were imposed at a single sentencing hearing, but counsel did not arrange for a single sentencing proceeding for the unsentenced charges of possession of methamphetamine and first degree unlawful possession of a firearm and the conviction for bail jumping in a second case, and where counsel did not object at a change of plea hearing on the bail jumping charge when the court scheduled sentencing to take place on another calendar after the appellant changed his plea. When the maximum sentence the appellant could have received at a single sentencing hearing for the two causes was 116 months and the total sentence he received was 176 months, was the appellant prejudiced by counsel's performance? Assignment of Error 3.

**C. STATEMENT OF THE CASE**

**1. Procedural history:**

On September 23, 2008, a jury found appellant Kevin Bowen guilty of unlawful possession of methamphetamine and unlawful possession of a firearm, the Honorable James Sawyer II presiding. (Mason County Superior Court cause number 08-1-262-4).<sup>1</sup> Report of Proceedings at 1, 5, 18. Following conviction, Bowen failed to appear for sentencing on September

---

<sup>1</sup>Bowen's appeal in that case is pending in this Court in Cause No. 40457-5.

26, 2008, and a warrant issued for his arrest. RP at 4. He was subsequently arrested in Kitsap County on November 14, 2008, and later convicted in that county of unlawful possession of a firearm in the first degree. RP at 4, 14, 17, 23. He was then returned to Mason County and came on for sentencing before Judge Sawyer, who had subsequently retired, on March 23, 2009. RP at 1. Bowen was also charged with bail jumping for failing to appear for sentencing on September 26, 2008, and arraigned on March 9, 2009. (Mason County Superior Court cause number 08-1-465-1). Clerk's Papers [CP] 39-40; RP at 23. RCW 9A.76.170. Before sentencing on cause number 08-1-262-4 on March 23, 2009, Bowen requested to enter a change of plea to bail jumping in cause number 08-1-465-1. RP at 1. Bowen's counsel told Judge Sawyer that the intent was for Bowen to enter a guilty plea "prior to his being sentenced [in cause number 08-1-262-4] so that he can be pled and sentenced on both charges on the same day before Your Honor." RP at 2. Judge Sawyer declined to accept the guilty plea, stating:

I don't know that the defense has any right to expect that that would occur. Essentially, we have a matter here that was found—the defendant was found guilty back in September of '08, has been pending for sentencing . . . [and that the matter was] originally scheduled for sentencing on 9/26 of '08.

RP at 2.

The court proceeded with sentencing in cause number 08-1-262-4, and defense counsel agreed that his offender points for both counts was “9 plus,” and that his standard range for count 1 was 12 to 24 months and 87 to 116 months for count 2. RP at 5. The court imposed concurrent 24-month and 116-month sentences. RP 8.

Later that day, the Honorable Amber Finley accepted Bowen’s guilty plea to bail jumping. RP at 12. The court stated that Bowen had an offender score of “9 plus” and a standard range of 51 to 60 months. RP at 12. The court set the matter for sentencing on April 13, 2009, but Bowen was ultimately not returned to Mason County until November 16, 2009. RP at 15.

At sentencing, new defense counsel argued that after Bowen was arrested in Kitsap County

they worked a deal whereby everything would be run concurrently with Kitsap and Mason County, and the matter was sent back here to Mason County.

When Mr. Bowen arrived the first time, I understand that Judge Sawyer was not present, so they set the matters over before Judge Sawyer when he would be present. And on the day Judge Sawyer sentenced Mr. Bowen, he was—he, at that point, was already retired, so he was essentially a pro tem on any other matters that would have come before him, and he refused to accept the plea on the bail jump.

RP at 18-19.

Defense counsel argued that Bowen wanted to be sentenced on March 23, and the sentencing was set over by the court, and that the cases should be presumed to be served concurrently. RP at 19. Counsel argued that Bowen pleaded guilty “on the same day that he was sentenced [on the other case], and requested to be sentenced on that same day.” RP at 19. Defense counsel noted that he anticipated prior to an agreement with Kitsap County prosecutor, that

he was to come down here [to Mason County], plead the same day that he was being sentenced on the other matter, and then the matters would be ran concurrently. And he came down here, he did plead, and for some reason the matter was continued, but it was not at Mr. Bowen’s request. So, I still do believe that he’s entitled to his presumption of concurrent time, even though technically it’s not the same day.

RP at 25.

The State recommended a sentence of 60 months, to be served consecutively to 08-1-262-4. RP at 24. The State argued that it was never the intention of his office for the matter to be served concurrently with the Kitsap County sentence. RP at 27. The State noted that

if [Mr. Bowen] comes down to Mason County and enters a plea and we schedule sentencing for the same day, he would have a presumption of concurrent sentences as far as the bail jumping and [08-1-262-4]. But that would be the only circumstances under which I would even entertain . . . concurrent sentences.

...

[Defense counsel] Mr. Morrison talks about the presumption that he should get the benefit of. This isn't March 23, 2009. He's not being sentenced on the same day. He wasn't even scheduled to be sentenced on the same day. At the time he was sentenced on the other case, he was still pending trial in this case.

RP at 28.

The court found that Bowen had not entered a plea on this case, and that it "wasn't until after the sentencing in that that he entered the plea." RP at 31. The court found that there was no presumption of concurrent sentencing, and ordered that the sentences should be served consecutively. RP at 31. The court also stated that "there is a basis for an exceptional sentence here, based on the amount of criminal history that you have incurred . . . ." RP at 31. After allocution, however, the court noted that it was not imposing an exceptional sentence. RP at 33. The court imposed a 60-month standard range sentence<sup>2</sup> to be served consecutively to the 116 months imposed in cause number 08-1-262-4. RP at 8, 33; CP 12-27.

Timely notice of appeal by the defense was filed on November 16,

---

<sup>2</sup>Bowen submits that although the sentence is within the standard range given his offender score of "9 plus" points, the sentence nevertheless constitutes an exceptional sentence since it was run consecutively to his convictions for possession of methamphetamine and unlawful possession of a firearm.

2009. CP 11. This appeal follows.

**D. ARGUMENT**

**THE SENTENCING COURT ERRED WHEN IT FOUND THE PRESUMPTION OF CONCURRENT SENTENCING DID NOT APPLY AND ORDERED THAT THE SENTENCES BE RUN CONSECUTIVELY.**

The sentencing court erred by finding that the offenses of possession of methamphetamine and unlawful possession of a firearm in the first degree (Mason County cause no. 08-1-262-4) and bail jumping (Mason County cause no. 08-1-262-4) were not “current offenses” because the sentences were not imposed on the same day.

Sentences for multiple current offenses, other than serious violent offenses, are generally concurrent. RCW 9.94A.589(1)(a), (b). Bowen was sentenced by Judge Sawyer for possession of methamphetamine and unlawful possession of a firearm on March 23, 2009, and entered his guilty plea to bail jumping before Judge Finlay on the same day. RCW 9.94A.525(1) provides:

(1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is

being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

A conviction means an "adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." RCW 9.94A.030(9).

RCW 9.94A.589(1)(a) provides that sentences for multiple current offenses are generally concurrent. Consecutive sentences for multiple current offenses can only be imposed under the statutory provisions for exceptional sentences. RCW 9.94A.589(1)(a).

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

Bowen argues that the sentencing court misinterprets RCW 9.94A.589 and that based on that misunderstanding, presumed that the presumption did

not apply and incorrectly applied RCW 9.94A.589(3) instead. Bowen was sentenced on March 23, 2009 in cause number 08-1-262-4 for possession of methamphetamine and first degree unlawful possession of a firearm. RP at 3. Later on the same day, Judge Finlay accepted his guilty plea to bail jumping. RP at 12-16. Bowen was sentenced on the bail jumping conviction on November 19, 2009. Bowen argues that because he was sentenced for possession of methamphetamine and unlawful possession of a firearm, and the court accepted his guilty plea for bail jumping on the same day, the acceptance of the plea constitutes a conviction as defined in RCW 9.94A.030(9), and that because under RCW 9.94A.525(1) convictions that are entered or sentenced on the same date as the conviction for which the offender score is being computed, the March 23, 2009 conviction is therefore an “other current offense” and presumed to be served concurrently.

This was error that requires reversal of Bowen's sentence because, under the Sentencing Reform Act (SRA), the language in RCW 9.94A.589(1) reveals the legal presumption is for concurrent sentences rather than consecutive sentences. Therefore, this Court should reverse Bowen's sentence and remand for a resentencing in which the sentencing court properly recognizes the presumption for concurrent sentences under these

circumstances. See *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (reversal required unless record clearly indicates that the sentencing court would have imposed the same sentence absent the error).

2. **THE TRIAL COURT IMPOSED AN EXCEPTIONAL SENTENCE WITHOUT PRIOR NOTICE BY THE STATE, IN VIOLATION OF BOWEN'S RIGHT TO DUE PROCESS UNDER THE FEDERAL AND STATE CONSTITUTIONS.**

As noted in § 1, *supra*, sentences for multiple current offenses, other than serious violent offenses, are generally concurrent. RCW 9.94A.589(1)(a), (b). Consecutive sentences for multiple current offenses that are not serious violent offenses constitute exceptional sentences. *State v. Newlun*, 142 Wn. App. 730, 735 n.3, 176 P.3d 529 (2008). "Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a).

"Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a). The trial court imposed an exceptional sentence by ordering that Bowen's March 23, 2009 sentence for possession of methamphetamine and first degree unlawful possession of a firearm be run consecutive to the sentence for bail jumping. "Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW

9.94A.537.” RCW 9.94A.535. Under RCW 9.94A.537(1), “[t]he State must give notice at any time prior to trial, ‘if substantial rights of the defendant are not prejudiced,’ that it is seeking a sentence above the standard range.” *State v. Bobenhouse*, 143 Wn. App. 315, 331, 177 P.3d 209 (2008) (quoting RCW 9.94A.537(1)); *see also State v. Womac*, 160 Wn.2d 643, 663, 160 P.3d 40 (2007) (recognizing “RCW 9.94A.537(1) permits the imposition of an exceptional sentence only when the State has given notice, prior to trial, that it intends to seek a sentence above the standard sentencing range”).

Here, the record shows the State failed to give notice that it was seeking an exceptional sentence. Despite this, the State argued that the presumption of concurrent sentencing did not apply, that the sentences should be consecutive:

[t]here is a basis for an exceptional sentence in this matter, and that’s plain on its face. It’s a free crime if it’s not consecutive. Mr. Bowen is—has—comes to this court with twenty-seven, now, prior felony convictions.

....

The bail jumping that he committed, if it’s concurrently with the case that he jumped bail on, is a completely free crime. It doesn’t enhance—there’s no increase in the sentence.

RP at 29.

The trial court, in finding that the presumption did not apply, also found that “there is a basis for an exceptional sentence here, based on the

amount of criminal history” that Bowen has incurred. RP at 31. The court stated later in the hearing:

As I indicated earlier, that alone would be a basis for an exceptional sentence. The Court’s not going to order an exceptional sentence. To you, perhaps, it feels that way because the Court is doing it consecutively, but this is time that you’ve earned.

RP at 33.

Bowen submits that the sentence constitutes an exceptional sentence and that the State failed to provide the statutorily required notice of its intent to seek an exceptional sentence. RCW 9.94A.537(1). As a result, Bowen was deprived of due process. Due process requires the State to prove each element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

In response to *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the Legislature amended the SRA, providing:

At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

RCW 9.94A.537(1). This procedure ensures that where a defendant's sentence is increased above that otherwise permitted by statute, the defendant's constitutional right to jury trial is protected. *Blakely*, 124 S. Ct. at 2537.

An exceptional sentence may be imposed only when the State provides notice as required in RCW 9.94A.537(1). *State v. Womac*, 160 Wn.2d at 661, n.10. Although in this case the trial court did not formally impose an exceptional sentence in the Judgment and Sentence, and did not enter findings of fact, Bowen submits that his sentence is based upon a legislative exception in which the trial court may still impose an aggravated exceptional sentence without a finding by the jury if it finds the defendant committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished. RCW 9.94A.535(2)(c). RP at 31. The appellant recognizes that although the trial court judge initially stated that "there is a basis for an exceptional sentence,"<sup>3</sup> the court ultimately found that it was not going to order an exceptional sentence. The appellant anticipates that the State will respond that the sentence was not an exceptional sentence, and that the circumstances are the

---

<sup>3</sup>RP at 31.

same as in *State v. Moore*, 63 Wn.App. 466, 469-71, 820 P.2d 59 (1991), a case heard in Division 1 of this Court. In *Moore*, which was a case involving several defendants, defendant Evans was convicted of two burglary charges in 1987. *Moore*, 63 Wn.App. at 467. Evans failed to appear for sentencing despite several warrants having been issued for his arrest. *Id.* On May 2, 1990 he was convicted of assault. The two unsentenced burglary convictions were brought before the court for sentencing, along with the assault conviction, on June 22, 1990. *Id.* at 467-68. The court first imposed concurrent sentences for the burglary convictions, and then expressly ordered the sentence for assault to run consecutively to the burglary sentences. *Id.* at 468. Evans argued that because the sentences were all entered on the same date, the presumption of concurrent sentencing should control the outcome, and that by running the sentences consecutively, the trial court had imposed an exceptional sentence for which no basis was stated. *Id.* at 470. Division 1 held, however, that the trial court properly implemented former RCW 9.94A.400(3), which is now recodified as RCW 9.94A.589(3), by expressly ordering consecutive sentences. *Moore*, 63 Wn.App. at 471. The Court held that by doing so, the trial court “simply effectuated what would have been done in the originally scheduled sentencing hearing if Evans’ misconduct

had not prevented that hearing from taking place.” *Moore*, 63 Wn.App. at 470 n.2. The Court also noted that this conclusion is consistent with *In re Long*, 117 Wn.2d 292, 815 P.2d 257 (1991). *Moore*, 63 Wn.App. at 470 n.2.

Bowen submits that *Moore* is not controlling because, in his case, the State voiced no objection if Bowen had in fact been sentenced on March 23, 2009 for bail jumping. The deputy prosecutor noted he would not agree to having the bail jumping sentence run current with Bowen’s Kitsap County sentence, but that he had stated to Bowen’s Kitsap County attorney that

as a practical reality, if [Bowen] comes down to Mason County and enters a plea and schedule sentencing for the same day, he would have presumption of concurrent sentences as far as the bail jumping and the other case, the UPF 1 and possession of controlled substance. But that would be the only circumstances under which I would even entertain consecutive—or, concurrent sentences.

RP at 27-28.

Bowen submits that the sentence falls within RCW 9.94A.589(1)(a), and that the consecutive sentence constitutes an exceptional sentence for which the State provided no notice. At sentencing, the deputy prosecutor urged the court to consider that if the court failed to impose an exceptional sentence, the crime would constitute a “free” crime. The court, although it couched its ruling as a standard range sentence, imposed a sentence of 60 months, to run consecutively to a 116 month sentence in cause number 08-1-

262-4, for a total of 176 months. CP 17. Without prior notice, this sentence deprived Bowen of due process and must be reversed.

3. **BOWEN DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CHANGE OF PLEA AND SENTENCING HEARINGS.**

Assuming *arguendo* that the Court disagrees with the appellant's arguments in sections 1 and 2, *supra*, and finds that RCW 9.94A.589(3) is applicable, counsel argues in the alternative that Bowen received ineffective assistance of counsel.

The federal and state constitutions provide a criminal defendant with the right to representation of counsel and to due process of law. U.S. Const. amends. 6, 14; Wash. Const. art. 1, §§ 3, 22.<sup>4</sup> The right to counsel necessarily includes the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Personal Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

Representation of a criminal defendant entails numerous duties, including advocating the defendant's case, consulting with him on important decisions, and keeping him informed of developments during the course of

---

<sup>4</sup>The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The Fourteenth Amendment provides in part, ". . . nor shall any State deprive any person of life, liberty or property without due process of law . . ." Article 1, § 22 provides in part, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . .

the prosecution. *Strickland*, 466 U.S. at 688. The right to the effective assistance of counsel is not met simply because an attorney is present in court; the attorney must actually assist the client and play a role in ensuring the proceedings are adversarial and fair. *Id.* at 685. When a defendant alleges he did not receive effective assistance of counsel, the appellate court must determine (1) whether the attorney's performance fell below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance prejudice the defendant. *Strickland*, 466 U.S. at 687-88; *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In reviewing the first prong, courts presume counsel's representation was effective. *Strickland*, 466 U.S. at 689; *Thomas*, 109 Wn.2d at 226. To show prejudice under the second prong, the defendant must show a reasonable probability that the deficient performance altered the outcome of the case. *Strickland*, 466 U.S. at 693-94; *Thomas*, 109 Wn.2d at 226.

Bowen had the right to the effective assistance of counsel at his change of plea hearing and sentencing. Sentencing is a critical stage of the proceeding where the accused is entitled to the effective assistance of counsel. *In re Morris*, 34 Wn.App. 23, 658 P.2d 1279 (1983); CrR 3.1(b)(2).

---

.” Article 1, § 3 states simply, “No person shall be deprived of life, liberty, or property, without due process of law.”

See *United States v. Leonti*, 326 F.3d 1111, 1117 (9 Cir. 2003) (defendant awaiting sentencing has right to effective assistance of counsel in willing efforts to cooperate with government). “Sentencing is a critical step in our criminal justice system. The fact that guilt has already been established should not result in indifference to the integrity of the sentencing process.” *State v. Ford*, 137 Wn.2d 472, 484, 973 P.2d 452 (1999).

Bowen’s first attorney understood that his client potentially faced consecutive sentences when he was sentenced for bail jumping on a different day than unsentenced possession of methamphetamine and unlawful possession of a firearm charge. His counsel stated to Judge Sawyer that “the intent all along was to plead Mr. Bowen to this [charge of bail jumping] prior to his being sentenced so that he can be pled and sentenced on both charges on the same day before Your Honor.” RP at 2. Judge Sawyer declined to take the plea on March 23, and Judge Finlay accepted the guilty plea later that day. After accepting his plea, the court asked if they should do the sentencing next week. RP at 15. The State’s attorney responded that that date would fine, and the court then stated that there would be eleven sentencings that day, and that two weeks would be better. The State replied that two weeks would be better, and said that because Bowen was in prison, he would need to be transported back for sentencing. RP at 15. Inexplicably, defense counsel made no statements at all to the court regarding sentencing and did not object

to the continuance. RP at 15-16. Ultimately, Bowen was not returned to Mason County for sentencing until November, 2009.

Bowen's attorney could easily have objected on March 23 to having the sentencing set for another day. Due to his attorney's inaction, Bowen was sentenced on separate days and received consecutive sentences. As noted in section 1 of this brief, the court would have been required to run the sentences for the two felony counts concurrently to each other. RCW 9.94A.589(1). As noted *supra*, RCW 9.94A.589(1)(a) provides, "Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535." But because Bowen was sentenced for bail jumping on a different day than the other charges, the trial court appears to have determined that RCW 9.94A.589(3) applied. RCW 9.94A.589(3) gives the court discretion to impose the second sentence either concurrent or consecutive to the first sentence. The statute reads:

Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

*Id.*

Thus, the timing of sentencing proceedings is critical when a

defendant is found in guilty in separate proceedings. Competent counsel would have been aware of the concurrent and consecutive sentencing provisions and the best way to help his client. Bowen's attorney understood the ramifications of sentencing when he addressed Judge Sawyer the morning of March 23, 2009, but by the afternoon he was apparently innocent of the knowledge that it would make a significant difference in Bowen's future if he were to be sentenced for both matters at the same hearing, and failed to object to setting the sentencing over to another day. In addition, counsel made no effort to ensure the sentencing hearings in both cases were held on the same day by scheduling the matters accordingly. Instead, he apparently left it to chance that Judge Sawyer would accept an unscheduled change of plea at the sentencing hearing on March 23, and, after arranging for Judge Finlay to take the plea, left it to chance that his client would be sentenced immediately after changing his plea.

Division 1 noted in *Moore, supra*, that it normally "would not countenance a prosecutor's actions of deliberately scheduling sentencing hearings for a defendant's multiple convictions in such a way as to avoid the presumption of concurrent sentences under the provisions of the Sentencing Reform Act." *Moore*, 63 Wn.App. at 471. Accordingly the court would likely have combined all the cases for a single sentencing hearing if Bowen's attorney had made the request.

Bowen was undeniably prejudiced by his attorney's deficient performance. He received consecutive sentences because he was sentenced on different days for the two cases even though they could easily been scheduled for sentencing on the same day. Bowen's attorney apparently understood that he was exposing Bowen to consecutive sentences, but nevertheless failed to object to setting sentencing for another day after he changed his plea and remained utterly silent during that portion of the hearing, and did nothing to ensure both sentencings would be heard on the same day. RCW 9.94A.589. This significantly increased Bowen's punishment. Because Bowen received consecutive sentences totaling 176 months, he was prejudiced by his attorney's performance.

Accordingly, this Court should reverse Bowen's sentence and remand with direction that he receive concurrent sentences.

**E. CONCLUSION**

For the reasons set forth above, this Court should reverse Kevin Bowen's sentence and remand for resentencing.

DATED: April 16, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'P. B. Tiller', is written over the printed name of the law firm.

THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835  
Of Attorneys for Kevin Bowen

## APPENDIX A

### COURT RULES

#### **RCW 9.94A.030**

##### **Definitions.**

(9) "Conviction" means an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.

#### **RCW 9A.76.170**

##### **Bail jumping.**

(1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

(2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

(3) Bail jumping is:

(a) A class A felony if the person was held for, charged with, or convicted of murder in the first degree;

(b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in the first degree;

(c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony;

(d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

**RCW 9.94A.525**  
**Offender score.**

**\*\*\* CHANGE IN 2010 \*\*\* (SEE 2777-S.SL) \*\*\***

The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

(1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

(2)(a) Class A and sex prior felony convictions shall always be included in the offender score.

(b) Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

(d) Except as provided in (e) of this subsection, serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction.

(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered "prior offenses within ten years" as defined in RCW 46.61.5055.

(f) This subsection applies to both adult and juvenile prior convictions.

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

(4) Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses.

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the

highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations;

(ii) In the case of multiple prior convictions for offenses committed before July 1, 1986, for the purpose of computing the offender score, count all adult convictions served concurrently as one offense, and count all juvenile convictions entered on the same date as one offense. Use the conviction for the offense that yields the highest offender score.

(b) As used in this subsection (5), "served concurrently" means that: (i) The latter sentence was imposed with specific reference to the former; (ii) the concurrent relationship of the sentences was judicially imposed; and (iii) the concurrent timing of the sentences was not the result of a probation or parole revocation on the former offense.

(6) If the present conviction is one of the anticipatory offenses of criminal attempt, solicitation, or conspiracy, count each prior conviction as if the present conviction were for a completed offense. When these convictions are used as criminal history, score them the same as a completed crime.

(7) If the present conviction is for a nonviolent offense and not covered by subsection (11), (12), or (13) of this section, count one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction and 1/2 point for each juvenile prior nonviolent felony conviction.

(8) If the present conviction is for a violent offense and not covered in subsection (9), (10), (11), (12), or (13) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(9) If the present conviction is for a serious violent offense, count three points for prior adult and juvenile convictions for crimes in this category, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(10) If the present conviction is for Burglary 1, count prior convictions as in subsection (8) of this section; however count two points for each prior adult Burglary 2 or residential burglary conviction, and one point for each prior juvenile Burglary 2 or residential burglary conviction.

(11) If the present conviction is for a felony traffic offense count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; for each serious traffic offense, other than those used for an enhancement pursuant to RCW 46.61.520(2), count one point for each adult and 1/2 point for each juvenile prior conviction; count one point for each adult and 1/2 point for each juvenile prior conviction for operation of a vessel while under the influence of intoxicating liquor or any drug.

(12) If the present conviction is for homicide by watercraft or assault by watercraft count two points for each adult or juvenile prior conviction for homicide by watercraft or assault by watercraft; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; count one point for each adult and 1/2 point for each juvenile prior conviction for driving under the influence of intoxicating liquor or any drug, actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug, or operation of a vessel while under the influence of intoxicating liquor or any drug.

(13) If the present conviction is for manufacture of methamphetamine count three points for each adult prior manufacture of methamphetamine conviction and two points for each juvenile manufacture of methamphetamine offense. If the present conviction is for a drug offense and the offender has a criminal history that includes a sex offense or serious violent offense, count three points for each adult prior felony drug offense conviction and two points for each juvenile drug offense. All other adult and juvenile felonies are scored as in subsection (8) of this section if the current drug offense is violent, or as in subsection (7) of this section if the current drug offense is nonviolent.

(14) If the present conviction is for Escape from Community Custody, RCW 72.09.310, count only prior escape convictions in the offender score. Count adult prior escape convictions as one point and juvenile prior escape convictions as 1/2 point.

(15) If the present conviction is for Escape 1, RCW 9A.76.110, or Escape 2, RCW 9A.76.120, count adult prior convictions as one point and juvenile prior convictions as 1/2 point.

(16) If the present conviction is for Burglary 2 or residential burglary, count priors as in subsection (7) of this section; however, count two points for each adult and juvenile prior Burglary 1 conviction, two points for each adult prior Burglary 2 or residential burglary conviction, and one point for each juvenile prior Burglary 2 or residential burglary conviction.

(17) If the present conviction is for a sex offense, count priors as in subsections (7) through (11) and (13) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction.

(18) If the present conviction is for failure to register as a sex offender under RCW 9A.44.130(11), count priors as in subsections (7) through (11) and (13) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction, excluding prior convictions for failure to register as a sex offender under RCW 9A.44.130(11), which shall count as one point.

(19) If the present conviction is for an offense committed while the offender was under community custody, add one point. For purposes of this subsection, community custody includes community placement or postrelease supervision, as defined in chapter 9.94B RCW.

(20) If the present conviction is for Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2, count priors as in subsections (7) through (18) of this section; however count one point for prior convictions of Vehicle Prowling 2, and three points for each adult and juvenile prior Theft 1 (of a motor vehicle), Theft 2 (of a motor vehicle), Possession of Stolen Property 1 (of a motor vehicle), Possession of Stolen Property 2 (of a motor vehicle), Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2 conviction.

(21) The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no

bearing on whether it is included in the criminal history or offender score for the current offense. Prior convictions that were not counted in the offender score or included in criminal history under repealed or previous versions of the sentencing reform act shall be included in criminal history and shall count in the offender score if the current version of the sentencing reform act requires including or counting those convictions. Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.

**RCW 9.94A.535**

**Departures from the guidelines.**

**\*\*\* CHANGE IN 2010 \*\*\* (SEE 5516.SL) \*\*\***

**\*\*\* CHANGE IN 2010 \*\*\* (SEE 2424-S.SL) \*\*\***

**\*\*\* CHANGE IN 2010 \*\*\* (SEE 2777-S.SL) \*\*\***

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

### (1) Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

### (2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without

a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances - Considered by a Jury -Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

- (p) The offense involved an invasion of the victim's privacy.
- (q) The defendant demonstrated or displayed an egregious lack of remorse.
- (r) The offense involved a destructive and foreseeable impact on persons other than the victim.
- (s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.
- (t) The defendant committed the current offense shortly after being released from incarceration.
- (u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.
- (v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.
- (w) The defendant committed the offense against a victim who was acting as a good samaritan.
- (x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.
- (y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).
- (z)(i)(A) The current offense is theft in the first degree, theft in the second degree, possession of stolen property in the first degree, or possession of stolen property in the second degree; (B) the stolen property involved is metal property; and (C) the property damage to the victim caused in the course of the theft of metal property is more than three times

the value of the stolen metal property, or the theft of the metal property creates a public hazard.

(ii) For purposes of this subsection, "metal property" means commercial metal property, private metal property, or nonferrous metal property, as defined in RCW 19.290.010.

(aa) The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

**RCW 9.94A.537**

**Aggravating circumstances — Sentences above standard range.**

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(2) In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

(3) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

(4) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing, or unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not

part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

(5) If the superior court conducts a separate proceeding to determine the existence of aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t), the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

(6) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

#### **RCW 9.94A.589**

##### **Consecutive or concurrent sentences.**

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard

sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(2)(a) Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

(b) Whenever a second or later felony conviction results in community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(4) Whenever any person granted probation under RCW 9.95.210 or 9.92.060, or both, has the probationary sentence revoked and a prison sentence imposed, that sentence shall run consecutively to any sentence imposed pursuant to this chapter, unless the court pronouncing the subsequent sentence expressly orders that they be served concurrently.

(5) In the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement or conditions of any of the sentences. Except for exceptional sentences as authorized under RCW 9.94A.535, if two or more sentences that run consecutively include periods of community supervision, the aggregate of the community supervision period shall not exceed twenty-four months.

FILED  
COURT OF APPEALS  
DIVISION II

10 APR 20 PM 1:51

STATE OF WASHINGTON

BY  DEPUTY

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

KEVIN R. BOWEN,

Appellant.

COURT OF APPEALS NO.  
40020-1-II

MASON COUNTY NO.  
08-1-00465-1

AMENDED CERTIFICATE  
OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Kevin R. Bowen, Appellant, and Gary Burleson, Mason County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on April 16, 2010, at the Centralia, Washington post office addressed as follows:

Mr. Gary Burleson  
Deputy Prosecuting Attorney  
PO Box 639  
Shelton, WA 98584

Mr. David Ponzoha  
Clerk of the Court  
Court of Appeals  
950 Broadway, Ste.300  
Tacoma, WA 98402-4454

AMENDED CERTIFICATE  
OF MAILING

1

**THE TILLER LAW FIRM**  
ATTORNEYS AT LAW  
ROCK & PINE - P.O. BOX 58  
CENTRALIA, WASHINGTON 98531  
TELEPHONE (360) 736-9301  
FACSIMILE (360) 736-5828

Mr. Kevin R. Bowen  
DOC #914948  
W.C.C.  
P.O. Box 900  
Shelton, WA 98584

Dated: April 19, 2010.

THE TILLER LAW FIRM

---

PETER B. TILLER – WSBA #20835  
Of Attorneys for Appellant

AMENDED CERTIFICATE  
OF MAILING

2

**THE TILLER LAW FIRM**  
ATTORNEYS AT LAW  
ROCK & PINE – P.O. BOX 58  
CENTRALIA, WASHINGTON 98531  
TELEPHONE (360) 736-9301  
FACSIMILE (360) 736-5828